IN THE

Supreme Court of The United States

OCTOBER TERM, 1978

No. 77-926

GERALDINE G. CANNON,
Petitioner,

v.

THE UNIVERSITY OF CHICAGO, ET AL.,
Respondents.

GERALDINE G. CANNON,
Petitioner,

v.

NORTHWESTERN UNIVERSITY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL CENTER FOR LAW AND THE HANDICAPPED, INC.; AMERICAN COALITION OF CITIZENS WITH DISABILITIES, INC.; DISABILITY RIGHTS CENTER, INC.; NATIONAL ASSOCIATION OF THE DEAF LEGAL DEFENSE FUND OF THE NATIONAL ASSOCIATION OF THE DEAF; WESTERN LAW CENTER FOR THE HANDICAPPED; STATE OF INDIANA PROTECTION AND ADVOCACY SERVICE COMMISSION FOR THE DEVELOPMENTALLY DISABLED; ADVOCATE FOR THE DEVELOPMENTALLY DISABLED; ADVOCACY, INC.; AND WISCONSIN COALITION FOR ADVOCACY AMICI CURIAE

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INTEREST OF *AMICI CURIAE*

This brief *amici curiae* is filed by national and state groups concerned about the civil rights of handicapped persons.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, prohibits discrimination against otherwise qualified handicapped persons in programs receiving Federal financial assistance. Section 504 follows closely the language of Title IX, the statute at issue in this case, as well as Title VI of the Civil Rights Act of 1964. The legislative history of Section 504 indicates that Congress intended for the three statutes to be enforced uniformly and that the private right of action Congress recognized for Section 504 was influenced by what Congress viewed as a private right of action under Title IX and Title VI. *Amici* argue that, given the close relationship among these three statutes, a brief to this Court on Section 504, its history, its interpretation by the courts and its administration by the Department of Health, Education and Welfare would be useful to the Court in the resolution of this important case. Moreover, a decision by the Court on the issue of a private right of action under Title IX will certainly influence the future enforcement by courts and administrative agencies of Section 504.

The *amici* filing this brief are both national and state organizations working with issues of the legal rights of handicapped persons. The National Center for Law and the Handicapped, Inc. of South Bend, Indiana (NCLH) is a research, advocacy, and education organization concerned with questions involving the legal rights of physically and mentally handicapped persons. NCLH is sponsored by the American Bar Association Family Law Section, the Council for the Retarded of St. Joseph County Indiana, Inc., the National Association for Retarded Citizens, and the University of Notre Dame Law School. NCLH has served as *amicus curiae* in this Court, as well as in state and federal courts throughout the United States.

The American Coalition of Citizens with Disabilities, Inc. of Washington, D.C. (ACCD) is the largest

organization directed by disabled people themselves to advocate on behalf of virtually every category of disabled Americans in every sector of life, as well as to work for the civil and human rights of disabled people. ACCD is an umbrella organization consisting of seventy-five member associations of and for disabled people with a combined membership exceeding seven million.

The Disability Rights Center, Inc. of Washington, D.C. is a public interest organization which engages in research on matters affecting the social and legal problems of persons with disabilities, and prepares, publishes and disseminates material concerning the legal rights of handicapped persons.

The National Association of the Deaf Legal Defense Fund (NAD-LDF) of Washington, D.C. is part of the National Association of the Deaf, the largest non-profit organization of deaf consumers in the United States with affiliates in forty-eight states. The NAD-LDF represents hearing-impaired people in litigation to advance their rights.

The Western Law Center for the Handicapped of Los Angeles, California is a non-profit public interest group which provides legal services to physically and mentally handicapped individuals whose legal problems stem from their handicaps and to organizations of handicapped individuals which advocate enforcement of the human rights of handicapped persons. The Western Law Center has worked in areas of employment discrimination, education of handicapped children, housing discrimination, architectural barriers, anti-trust and welfare law.

In addition to these national organizations, several state organizations established pursuant to the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6000 *et seq.*, join in this brief. These agencies provide legal

assistance and other forms of advocacy and protection to mentally retarded persons and persons with cerebral palsy, epilepsy, autism or any other closely related condition which results in an impairment similar to that of mental retardation or which requires treatment or services required by mentally retarded persons. These agencies are the State of Indiana Protection and Advocacy Service Commission for the Developmentally Disabled of Indianapolis, Indiana; Advocate for the Developmentally Disabled of New Orleans, Louisiana; Advocacy, Inc. of Austin, Texas; and the Wisconsin Coalition for Advocacy of Madison, Wisconsin.

Amici represent a wide range of persons with handicaps and view the issue of a private right of action under the Title VI-Title IX-Section 504 scheme as essential to the achievement of civil rights for handicapped persons, as well as for other minorities protected by those statutes. *Amici* are familiar with Section 504, its purposes and its significance for handicapped persons and believe that their participation in this case would be of benefit to the Court. The parties have consented to the filing of this Brief.

STATEMENT OF THE QUESTION PRESENTED

Does Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et seq.*, provide a private right of action to Petitioner?

STATEMENT OF THE CASE

In 1975 Petitioner Geraldine G. Cannon was denied admission to the Pritzker School of Medicine of the University of Chicago and to the Northwestern University Medical School. In April, 1975 Ms. Cannon filed written complaints against the medical schools with the Department of Health, Education and Welfare (H.E.W.) alleging that the schools had discriminated against her on

the basis of sex in violation of Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 (a). As late as June 2, 1976, H.E.W. had completed only the on-site portion of the investigations into Ms. Cannon's allegations, and H.E.W. was unable to advise when findings would be made in the complaints filed. *Petition for Writ of Certiorari*, at A-35.

In the summer of 1975, Petitioner filed lawsuits against each medical school alleging, *inter alia*, that the actions of the schools violated Title IX, particularly with respect to an age criterion which had the effect of discriminating against women. Petitioner subsequently amended her complaints in the lawsuits to join the Secretary of the Department of Health, Education and Welfare and the Regional Director of H.E.W.'s Office for Civil Rights, seeking an injunction against those defendants prohibiting H.E.W. from further delay in its action with respect to her administrative complaints against the two medical schools.

The District Court held that Title IX did not authorize a private right of action. *Cannon v. University of Chicago*, 406 F. Supp. 1257 (N.D. Ill. 1976). The Court of Appeals affirmed, 559 F.2d 1063 (7th Cir. 1976), and on rehearing also held that the inclusion of Title IX within the provisions of the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. §1988, did not imply an intent on the part of Congress to provide for a private right of action under Title IX. 559 F.2d at 1077. On rehearing, the Federal defendants reversed the position which they had asserted and argued that Title IX does provide a private right of action to individual litigants. While both the District Court and the Court of Appeals ruled on issues other than those involving Title IX, this Statement of the Case sets forth only the facts immediately concerning the Title IX issue before this Court.

SUMMARY OF ARGUMENT

In three statutes, Congress prohibited discrimination against women and certain minorities in Federally assisted programs. In addition to the rights granted to women in education programs by Title IX, Title VI of the Civil Rights Act of 1964 prohibited discrimination on the basis of race, color, or national origin and Section 504 of the Rehabilitation Act of 1973 prohibited discrimination against otherwise qualified handicapped persons. Section 504 was modeled on Title VI and Title IX and the legislative history of Section 504 reveals that Congress intended that the three statutes be enforced in a uniform manner. The private right of action recognized by courts under Section 504 is based not only upon the legislative history of that statute, but also upon this Court's interpretation of Title VI and implementing regulations in the context of the original legislative purpose behind Title VI. Enforcement of Title IX, as well as with Title VI and Section 504, will require independent judicial efforts.

The administrative enforcement procedures by which the lower court held Title IX should be enforced are not established primarily for the protection of indivdual rights and the resolution of individual complaints, but as a means for the Federal government to carry out its statutory obligation to terminate funds when recipients violate the law. A conflict may occur between such departments as Health, Education and Welfare which, in resolving a discrimination complaint, may wish to avoid the severe sanction of a termination of Federal funds (thereby injuring other beneficiaries of the program) and the individual complainant who seeks a remedy for a violation of the law. The secondary role of individual complainants is exemplified by the provisions in H.E.W. procedures which give you a complainant the status only of amicus curiae, without rights of a party, in administrative enforcement

proceedings. Considerations such as comity in a Federal system may influence the decisions of administrative officers in enforcement proceedings more than concerns about the rights of individuals. A private right of action is essential to protect the rights of individuals whose interests may vary from those of H.E.W.

The private right of action is further necessary for individual complainants because of the inadequacy of existing administrative procedures to enforce the law properly. H.E.W. has indicated that it is unable to resolve the large number of complaints filed under Title IX, as well as under Section 504. The Department's admitted failure to meet all of the requirements imposed on it by law is evident not only from the position taken by the Federal defendants in this case, but in published statements by the department making proposals to revise its enforcement process. Moreover, in an affidavit filed in pending litigation and appended to this Brief, H.E.W. indicates its willingness to have complaints brought under Section 504 resolved directly by the courts.

ARGUMENT

I. THE PRIVATE RIGHT OF ACTION RECOGNIZED UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973 SHOULD ENCOMPASS CLAIMS BROUGHT UNDER TITLE IX OF THE EDUCATION AMENDMENTS OF 1972.

A. Section 504, Title IX and Title VI of the Civil Rights Act of 1964 Are Analogues in the Federal Legislation To Combat Discrimination in Federally Financed Programs and Activities.

Section 504 of the Rehabilitation of 1973, 29 U.S.C. §794, reads:

> No otherwise qualified handicapped individual in the United States, as defined in Section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 504 was modeled on Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 (a), which reads in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...[with exceptions stated].

Both statutes reflect the influence of Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, which reads:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

These three Federal statutes form a triad to prohibit discrimination against protected individuals by recipients of Federal financial assistance. The legislative history of Section 504 clarifies the relationship among the three provisions:

> Section 504 was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964...and section 901 of the Education Amendments of 1972...The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap. It does not specifically require the issuance of regulations or expressly provide for enforcement procedures, but it is clearly mandatory in form, and such regulations and enforcement are intended.
>
> The language of section 504, in followig [sic] the above-cited Acts, further envisions the implementation of a compliance program which is similar to those Acts, including promulgation of regulations providing for investigation and review of recipients of Federal financial assistance, attempts to bring non-complying recipients into voluntary compliance through informal efforts such as negotiation, and the imposition of sanctions against recipients who continue to discriminate against otherwise qualified handicapped persons on the basis of handicap. Such sanctions would include, where appropriate, the termination of Federal financial assistance to the recipient or means otherwise authorized by law. Implementation of section 504 would also include pre-grant analysis of recipients to ensure that Federal funds are not initially provided to those who discriminate against handicapped individuals. Such analysis would include pre-grant review procedures and a requirement for assurances of compliance with section 504. This approach to implementation of section 504, which closely follows the models of the above-cited anti-discrimination provisions, would

ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and permit a judicial remedy through a private action.

It is intended that sections 503 and 504 be administered in such a manner that a consistent, uniform, and effective Federal approach to discrimination against handicapped persons would result. Thus, Federal agencies and departments should cooperate in developing standards and policies so that there is a uniform, consistent Federal approach to these sections. The Secretary of the Department of Health, Education, and Welfare, because of that Department's experience in dealing with handicapped persons and with the elimination of discrimination in other areas, should assume responsibility for coordinating the section 504 enforcement effort and for establishing a coordinating mechanism with the Secretary of the Department of Labor to ensure a consistent approach to the implementation of sections 503 and 504. The conferees fully expect that H.E.W.'s section 504 regulations should be completed by the close of this year. Delay beyond this point would be most unfortunate since the Act (P.L. 93-112) was enacted over one year ago—September 26, 1973.

4 U.S. Code, Cong. and Admin. News 6390-6391 (1974); *see Lloyd v. Regional Transportation Authority*, 548 F. 2d 1277, 1285-1286 (7th Cir. 1977).

The enactment of Section 504, together with other civil rights provisions of the Rehabilitation Act of 1973, marked a new day for handicapped persons in this Nation. Section 501 of the Act, 29 U.S.C. §791, imposed requirements on the federal government itself in the employment of handicapped individuals; Section 502, 29 U.S.C. §792, created the Architectural and Transportation Barriers Compliance Board, with the primary function of enforcing the Architectural Barriers Act of 1968, 42 U.S.C. §4151 *et seq.*;

and §503, 29 U.S.C. §793, imposed affirmative action requirements on certain federal contractors in their employment of handicapped individuals. Together these provisions, for the first time in the history of the United States, marshaled the civil rights enforcement power of the Federal government on behalf of handicapped persons. This legislation marked with unmistakable authority the change in our national policy toward handicapped persons from one of paternalism and purported benevolence to one of an active quest for legal equality. The rationale underlying this new direction was well expressed by Congress in the White House Conference on Handicapped Individuals Act, Pub. L. 93-516, 88 Stat. 1631-1634, Section 301:

> [I]t is of critical importance to this Nation that equality of opportunity, equal access to all aspects of society and equal rights guaranteed by the Constitution of the United States be provided to all individuals with handicaps;...
>
> 29 U.S.C. §701 (note).

B. A Private Right of Action Exists Under Section 504.

In *Lloyd v. Regional Transportation Authority*, 548 F. 2d 1277 (7th Cir. 1977), the court interpreted Section 504 to create affirmative rights on behalf of handicapped persons which could be enforced by means of a private right of action. While *Lloyd* was not the first case to enforce Section 504 on behalf of private litigants, *see e.g. Bartels v. Biernat*, 405 F. Supp. 1012 (E.D. Wis. 1975), *Hairston v. Drosick*, 423 F. Supp. 180 (S.D. W.Va. 1976), it was the first case to consider fully the question of the intent of Congress with respect to private enforcement of Section 504. The reasoning in *Lloyd* was quickly adopted and followed by other circuits. *Leary v. Crapsey*, 566 F. 2d 863 (2d Cir.

1977), *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977), *United Handicapped Federation v. Andre*, 558 F. 2d 413 (8th Cir. 1977), *Davis v. Southeastern Community College*, 574 F. 2d 1158 (4th Cir. 1978) *reh. den.* No. 77-1237 (4th Cir. June 29, 1978).

Lloyd involved a challenge by physically handicapped persons to continued federal assistance to an inaccessible public transportation system partly on the theory that such inaccessibility violated Section 504. In holding that a private right of action existed under Section 504, the court relied not only on the legislative history of Section 504 with its analogies to Title VI and Title IX, but also upon this Court's holding in *Lau v. Nichols*, 414 U.S. 563 (1974). Just as in *Lau* this Court looked to regulations promulgated by the Department of Health, Education, and Welfare to suggest the contours of the rights asserted by the school children in San Francisco, 414 U.S. at 566-569, the Court of Appeals in *Lloyd* looked to regulations promulgated by the Urban Mass Transportation Administration to determine whether affirmative rights existed comparable to those which this Court identified in *Lau*. The *Lloyd* court, like this Court, in *Lau*, did not specify a remedy or the exact dimensions of the rights available to the litigants. But in *Lau*, this Court had stated:

> Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.
>
> 414 U.S. at 566.

Adapting this language to the situation before it, the *Lloyd* court concluded that affirmative rights existed under Section 504:

> Under these [federal] standards there is no equality of treatment merely by providing [the handicapped] with the same facilities [as ambulatory persons]...; for [handicapped persons] who [can] not [gain access to such facilities] are effectively foreclosed from any meaningful [public transportation]. (citation and footnote omitted.)
>
> 548 F. 2d at 1284.

The *Lloyd* court read the legislative history language "[to] permit a judicial remedy through a private action" as "contemplat[ing] judicial review of an administrative proceeding as contradistinct from an independent cause of action in federal court." 548 F. 2d at 1286. The court expressly left open as premature the question of whether the judicial remedy established would be limited to post-administrative judicial review once procedural enforcement regulations were issued. *Ibid.*, n. 29. However, in a footnote the court did say, "[A]ssuming a meaningful administrative enforcement mechanism, the private cause of action under Section 504 should be limited to *a posteriori* judicial review." *Ibid.* Still, the court concluded:

> [I]t is plain that the rights of the handicapped were meant to be enforced at some point through the vehicle of a private cause of action. When administrative remedial machinery does not exist to vindicate an affirmative right, there can be no objection to an independent cause of action in the federal courts (footnote and citation omitted).
>
> 548 F. 2d at 1286.[1]

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[1] The Court of Appeals appears to have been confused on the issue of the Department of Health, Education and Welfare's enforcement process and the applicability of that process to the dispute in *Lloyd*. In proposed regulations to implement Section 504 for programs and activities receiving assistance from H.E.W., the Secretary indicated that once consolidated procedural rules for administration and enforcement of certain civil rights laws for which H.E.W. had

Based upon the legislative history of Section 504 and what the Court of Appeals in *Lloyd* called "a virtual one-to-one correspondence between the conceptual props supporting the concurring opinion in *Lau* and the elements of the instant case," 548 F. 2d at 1281, the court found that the criteria in *Cort v. Ash*, 422 U.S. 66 (1975), were met. Plaintiffs, as physically handicapped individuals, were

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(footnote 1 cont'd)

responsibility were promulgated, the Section 504 enforcement procedures would be through that mechanism. 41 F.R. 29548 (July 16, 1976). However, both the substantive regulations and the administrative enforcement mechanisms apply only to recipients of federal financial assistance *from H.E.W.* 45 C.F.R. §84.2. The defendants in *Lloyd* received federal financial assistance from the Department of Transportation; therefore, the H.E.W. enforcement procedures, had they existed, would never have been applicable to the alleged violation in *Lloyd*. The consolidated enforcement procedures for H.E.W. have still not been promulgated, and H.E.W. at present enforces Section 504 by means of the Title VI procedures. 45 C.F.R. §84.61. In an Analysis, the Secretary indicated his adoption of the Title VI complaint and enforcement procedures "until such time as they are superceded by the issuance of a consolidated procedural regulation applicable to all of the civil rights statutes and executive orders administered by the Department." 42 F.R. 22694 (May 4, 1977).

What may have confused the Court of Appeals was the authority given to H.E.W. by Executive Order 11914 as the principal department to coordinate implementation of Section 504 by other executive departments and agencies. 41 F.R. 17871 (April 29, 1976). H.E.W. had indicated that its proposed departmental regulations would be used in developing subsequent Executive Order guidelines. 41 F.R. 29548 (July 16, 1976), a position reiterated upon publication of the final H.E.W. departmental regulations. 42 F.R. 22677 (May 4, 1977). On January 13, 1978 H.E.W. published the final version of the Executive Order regulations, 43 F.R. 2132 (January 13, 1978), and on June 8, 1978 the Department of Transportation (DOT) published proposed regulations to comply with the Executive Order guidelines. 43 F.R. 25016 (June 8, 1978). The proposed DOT regulations provide a procedural enforcement mechanism which generally follows existing DOT Title VI enforcement procedures. 43 F.R. 25021, 25033-25035 (June 8, 1978).

among the class specifically benefitted by the statute. 548 F. 2d at 1285. The private cause of action was consistent with the statute's legislative history. 548 F. 2d at 1286, 4 U.S. Code, Cong. and Admin. News 6390-6391. The private cause of action implied was consistent with the general legislative scheme of the Rehabilitation Act of 1973 which had one explicitly detailed purpose to "enforce statutory and regulatory standards and requirements regarding barrier-free construction of public facilities and study and develop solutions to existing architectural and transportation barriers impeding handicapped individuals." 548 F. 2d at 1286, quoting 29 U.S.C. §701(11). A private right to sue would serve to enforce the uniform substantive standards established by administrative regulations, without resulting in spotty *ad hoc* remedies in various portions of the country. Finally, the private remedy would not undercut litigation in suits traditionally relegated to state law in areas basically the concern of the states. Congress intended the legislation underlying the litigation to deal with the "transportation needs of the handicapped on a national basis." 548 F. 2d at 1287.

The *Lloyd* court was aware of the initial decision in the instant case and commented upon the distinction between the large class in *Lau* (and *Lloyd*) and the individual plaintiff in *Cannon*. Moreover, as the *Lloyd* court found "no administrative remedy open to these plaintiffs," it held that neither exhaustion nor primary jurisdiction applied. 548 F. 2d at 1287.

With this view of the *Lloyd* case, the instant case gains some perspective. The view taken by the court below toward the issue of a private right of action is not simple. The court rejected a private right of action accruing from a

sole individual complaint before what it considered to be adequate exhaustion of administrative remedies. 559 F.2d at 1073. The holding stems from a concern for the most efficient use of limited judicial resources and from a view that providing direct access to courts would not be an effective remedy to the problem of slow H.E.W. administrative enforcement procedures. 559 F. 2d at 1075.

The court also discerned some advantages in requiring the plaintiff in this case to utilize the administrative procedures before seeking judicial review of her complaint. Referring to the doctrine of primary jurisdiction, the court identified specific factors which might justify deferring to agency expertise: the evaluation of the statistics of the applicant and entering classes at the various medical schools and the comparison of local practice to admissions policies on a national basis. 559 F. 2d at 1074-1075, n. 17. Additionally, the scheme of enforcement created by Congress, in the court's view, may indicate a desirable plan to have H.E.W. screen complaints, encourage their resolution, and seek voluntary compliance with the statute. In this respect, the court seemed to suggest that before complainants become litigants in a judicial proceeding, they should give the voluntary compliance alternative a chance to work. 559 F. 2d at 1081.

Although the court rejected the private right to sue in this case, it by no means approved of judicial abdication in the enforcement of Title IX. It distinguished the instant case from one where large numbers of persons allege class discrimination, a situation for which the court, apparently, would more likely reserve the private right to sue (although it did not decide this issue, 559 F. 2d at 1074, n. 16.) Of course, the court recognized the provision of Title IX allowing for judicial review of administrative action, 20 U.S.C. §1683. 559 F. 2d at 1073. But the court's most

important reservation for a private right of action, at least in terms of the issue before this Court, concerned those cases where no remedy was provided or where the remedies were inadequate:

> Were we confronted with an alleged violation of a fundamental federal constitutional or statutory right for which Congress has provided no remedy at all, or for which the remedies available have proven to be wholly inadequate to the task of protecting those rights, we might take a different view of the matter.
>
> 559 F. 2d at 1082.

The private right of action under Section 504 recognized in *Lloyd* originated from that court's determination that the legislative mandate embodied in the statute must be given immediate application. While *Lloyd* differs from *Cannon* in that there were no administrative remedies for the plaintiffs to exhaust and while *Lloyd* may appear to be consistent with *Cannon* in that it at least acknowledged the possibility that, given meaningful administrative enforcement remedies, exhaustion would be required, *Lloyd* does not turn upon either point. The essence of *Lloyd* is that, "[I]t is plain that the rights of the handicapped were meant to be enforced at some point through the vehicle of a private cause of action". 548 F. 2d at 1286. The express intent of Congress to create a remedy, as well as the absence of any intent by Congress to deny a remedy, together with the fact that the plaintiffs in *Lloyd* would have been left with no effective way to protect their civil rights had the court not implied a private right to sue, led the *Lloyd* court to recognize a private right of action. Exhaustion of administrative remedies as well as deferral to administrative agencies on the basis of primary jurisdiction are, under a proper reading of *Lloyd*, to be allowed only where such action is consistent with the underlying legislative mandate. To the extent that Cannon subordinates the

legislative purpose in providing a remedy under Title IX, it conflicts with Lloyd and that court's reading of the legislative history of Section 504, which we assert is determinative of the legislative intent of Title IX.

In *Lau v. Nichols*, 414 U.S. 563 (1974), this Court, solely on the basis of Section 601 of the Civil Rights Act of 1964, reversed a decision denying relief to non-English speaking students of Chinese ancestry who sought appropriate instruction from the San Francisco, California school system. This Court, interpreting the statute and regulations promulgated to implement the statute by the Department of Health, Education and Welfare found a basis for Federal courts to shape an appropriate remedy. The concurring opinion of Mr. Justice Blackmun is properly read, in our view, as concerned with the rationale for the remedy, not with the right to sue. As he stated, "I merely wish to make plain that when, in another case, we are concerned with a very few youngsters, or with just a single child who speaks only German or Polish or Spanish or any language other than English, I would not regard today's decision, or the separate concurrence, as conclusive upon the issue whether the statute and the guidelines require the funded school district to provide special instruction." 414 U.S. at 572. In *Regents of University of California v. Bakke*,____U.S.____, 98 S. Ct. 2733 (1978), four Justices of this Court concluded that Title VI of the Civil Rights Act of 1964 provided a private cause of action to an individual litigant.____U.S.____, 98 S. Ct. at 2811, (Stevens, J., concurring and dissenting). That view is based not only upon legislative history, but upon the holding in *Lau*, as well as the third party beneficiary theory of *Bossier Parish School Board v. Lemon*, 370 F. 2d 847 (5th Cir. 1967), *cert. den.* 388 U.S. 911 (1967). Moreover, those Justices pointed to *Lloyd* and its interpretation of the legislative history of Section 504 as an example of legislation enacted

by Congress on the assumption that Title VI may be enforced in a private action. 98 S. Ct. at 2814-2815, n. 27. See *Davis v. Southeastern College, supra* and *Kampmeier v. Nyquist, supra*, where courts recognized a private right to sue for individual plaintiffs under Section 504.

C. Effective Enforcement of Title IX Requires Independent Judicial Action.

The court below viewed the administrative procedures as an enforcement mechanism largely divorced from the power of courts to enforce the statute. Judicial enforcement, in the court's view, would be limited to the review of administrative action provided for by 20 U.S.C. §1683 and possibly to cases involving a large number of complainants. How the court would interpret the right to judicial action because of inadequate administrative enforcement procedures is unclear.

We submit that the role of judicial enforcement envisioned by the court under Title IX is much too limited and contrary to the tradition of active and independent enforcement of civil rights statutes by Federal courts. In the early enforcement efforts by federal courts to implement Title VI, a critical and independent judicial attitude emerged toward the actions of administrative agencies with respect to Title VI. In *United States v. Jefferson County Board of Education* 372 F. 2d 836 (5th Cir. 1966), *cert. den.* 389 U.S. 840 (1967), *reh. den.* 389 U.S. 965 (1967), *aff'd* 380 F. 2d 385 (5th Cir. 1967), the United States Court of Appeals for the Fifth Circuit had occasion to consider Guidelines promulgated by the Department of Health, Education and Welfare to effect desegregation of public school systems. The question before the court was not explicitly exhaustion of administrative remedies, but judicial consideration of administrative determinations of

appropriate desegregation efforts. The court noted the importance of active and independent judicial scrutiny of the issues:

> The Guidelines, of course, cannot bind the courts; we are not abdicating any judicial responsibilities. 372 F. 2d at 848 (footnote omitted).

The situation in the mid-sixties was such that the court viewed the activity of administrative agencies as intended by Congress to aid overworked courts in achieving rapid change:

> We read Title VI as a congressional mandate for a change—change in pace and method of enforcing desegregation. The 1964 Act does not disavow court-supervised desegregation. On the contrary, Congress recognized that to the courts belongs the last word in any case or controversy. But Congress was dissatisfied with the slow progress inherent in the judicial adversary process. Congress therefore fashioned a new method of enforcement to be administered not on a case by case basis as in the courts but generally, by federal agencies operating on a national scale and having a special competence in their respective fields. Congress looked to these agencies to shoulder the additional enforcement burdens resulting from the shift to high gear in school desegregation.
>
> 372 F. 2d at 852-853 (footnotes omitted).

Jefferson County reflects a partnership between the courts and administrative agencies in the enforcement of national civil rights. As the court stated, "When Congress delcares national policy, the duty the two other coordinate branches owe to the Nation requires that, within the law, the judiciary and the executive respect and carry out that policy." 372 F. 2d at 856. This active, independent attitude is also evident in *Kelly v. Altheimer, Arkansas Public School District No. 22*, 378 F. 2d 483, 492 (8th Cir. 1967), where the

court stated, "Regardless of the steps which may be taken by H.E.W. to secure compliance, we will not avoid our responsibility in the matter." See also, *Singleton v. Jackson Municipal Separate School District*, 355 F. 2d 865, 869 (5th Cir. 1966), *Kemp v. Beasley*, 352 F. 2d 14, 19 (8th Cir. 1965). In *Alexander v. Holmes County Board of Education* 396 U.S. 19, 21 (1969), this Court approved judicial cooperation with H.E.W. in desegregation, subject to modifications which the appropriate court deemed proper.

The spirit of active, independent judicial enforcement of the rights guaranteed by Title VI in these cases should be carried over to enforcement of Title IX. The task which these courts perceived was to enforce the law, whether by means of judicial action alone, administrative action, or a cooperative combination of both court and administrative action.

A similar independence is emerging in judicial enforcement of Section 504. In *Camenisch v. University of Texas*,____F. Supp.____, No. A-78-CA-061 (W.D. Tex. May 17, 1978), the court granted a preliminary injunction for a deaf graduate student suing under Section 504 to secure an interpreter to enable him to participate in classes. See 45 C.F.R. §84.44(d). The court's opinion aptly summarizes the difficulties of relying on administrative enforcement solely to implement Section 504:

> The applicable HEW regulations contain no provisions for providing emergency relief of the nature requested by Plaintiff. All administrative complaints are treated similarly. Plaintiff submits, in his Memorandum in Opposition to Defendants' Motion to Dismiss, the Office for Civil Rights' Annual Operating Plan for Fiscal Year 1978 reveals that only 26 of 756 handicap complaints filed in 1978 will be investigated. An HEW finding in Plaintiff's favor one

> or two years from now will give him no effective relief whatsoever, for, as the stipulations show, he may very well have lost his employment by then. If, on the other hand, HEW found for Defendants, it could order Plaintiff to reimburse the cost of interpretive services paid by Defendants. Plaintiff has previously offered such a course of action to Defendants, including his willingness to post an appropriate bond, but Defendants are unwilling.
>
> Slip Opinion at 2.

The *Camenisch* court found that "[E]xhaustion procedures are meaningless with respect to this Plaintiff..." *Ibid.* The court did require the plaintiff to pursue administrative remedies *after* the granting of the preliminary injunction, but here the court utilized the administrative agency for assistance. The court retained its enforcement authority over the statute. See also *Crawford v. University of North Carolina*, 440 F. Supp. 1047 (M.D.N.C. 1977). While some courts have required exhaustion, *Doe v. New York University*, 442 F. Supp. 522 (S.D.N.Y. 1978), *Barnes v. Converse College*, ____F. Supp.____, Civil Action No. 77-1116 (D.S.C. March 31, 1978) *appeal docketed*, No. 78-1440 (4th Cir. July 19, 1978), we believe that the *Camenisch* analysis is more consistent with the intent of Congress in enacting Section 504.

It should be noted that the United States as *amicus curiae* in *Whitaker v. City University of New York*, Docket No. 75 Civ. 2258 (JM) (E.D.N.Y. 1978) has taken the position that, "Section 504 is subject to enforcement by private litigants without prior exhaustion of administrative remedies." *Memorandum Of The United States As Amicus Curiae In Opposition To Defendants' Motion To Dismiss Section 504 Rehabilitation Act Claims* at 2. The position of the Government there is that a private plaintiff is not required

to secure administrative review prior to initiation of suit under Section 504. *Ibid.* at 9. The Government explicitly concedes that "[T]he regulations and available administrative remedies do not meet the *Lloyd* standards." *Ibid.* at 10. While the question of a private right of action is obviously one for the courts to decide, the Government's admission of the need for a private right of action under Section 504 and of the inability of administrative agencies to implement the statute should weigh heavily on the courts' determination that a private right of action is necessary.

II. THE ADMINISTRATIVE ENFORCEMENT PROCEDURES BY WHICH TITLE IX AND RELATED STATUTES ARE IMPLEMENTED ARE NOT APPROPRIATE FOR THE PROTECTION OF THE CIVIL RIGHTS OF INDIVIDUALS.

Courts and commentators have noted the limitations of the enforcement procedures for Title VI-Title IX-Section 504 and have interpreted the purposes of those statutes in terms of the limited enforcement procedures. In *Mayor and City Council of Baltimore v. Mathews*, 562 F. 2d 914 (4th Cir. 1977), the court commented on the purposes of Title VI:

> Title VI is a remedial rather than a punitive statute. It was designed to eliminate the financial participation of the federal government in illegal discrimination. At the same time, because federal aid has taken on increased significance in the funding of public education, it provides an economic incentive to end discrimination without resort to the judicial process. (Footnotes omitted).
>
> 562 F. 2d at 923.

In an opinion concurring in part and dissenting in part, Judge K. K. Hall divided the H.E.W. enforcement process into three parts:

(1) The voluntary compliance phase;

(2) The administrative hearing phase;

(3) The phase when the actual fund termination occurs. 562 F. 2d at 928.

In Judge Hall's view, "[T]he underlying thrust of Title VI requires HEW first to secure voluntary compliance eliminating discrimination if such method is reasonably possible." (citation omitted) 562 F. 2d at 930. See also *Adams v. Richardson*, 351 F. Supp. 636, 641 (D.D.C. 1972), *aff'd* 156 U.S. App. D.C. 267, 480 F. 2d 1159 (1973); *Johnson v. County of Chester*, 413 F. Supp. 1299, 1311 (E.D. Pa. 1976).

As one court noted, there are "many procedural bridges that must be crossed" before a legal sanction for violation of Title IX will take effect. *National Collegiate Athletic Association v. Califano*, 444 F. Supp. 425, 438 (D. Kansas 1978). The principal sanction available to a plaintiff for violation of Title IX is a funding cut-off, see *McCarthy v. Burkholder*, 448 F. Supp. 41 (D. Kansas 1978). More than a decade ago, the United States Court of Appeals for the Fourth Circuit commented that "The [administrative] complaint procedure is far from the most efficient or comprehensive means of enforcing Title VI." *Cypress v. Newport News General and Nonsectarian Hospital Association*, 375 F. 2d 648, 659 (4th Cir. 1967). Moreover, the dilemma presented to H.E.W. in terminating funds, and the potential conflict of interest with complainants who present cases of discrimination to H.E.W., is well expressed in this statement by a legal commentator:

> The Department's only weapon, although one that none of the parties want to see employed, is the threat of a termination of federal funds. Since virtually no one benefits from the school's loss of aid money, the prospect of whole-hearted HEW prosecution may be remote from the beginning. Moreover, in the informal negotiations, HEW, for the sake of harmony or of saving the expense of the hearing process, might settle for a plan that falls far short of what the complainants envisage. In the hearings, the Department might opt not to oppose all the policies and practices that the complainants find objectionable. It might not pursue the attack with all the vigor that the complainants may wish. This exhaustive procedure is thus likely to result only in an indirect blow to the discrimination. In these circumstances, the complainant may well prefer to take more direct action. Todd, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools*, 53 Texas L. Rev. 103, 120 (1974).

The peculiar status of the persons who file administrative complaints in the H.E.W. enforcement process is illustrated by the provision which states that persons submitting complaints are not considered parties to the proceedings to resolve those complaints, but may petition, after proceedings are initiated, to become amicus curiae. 45 C.F.R. §81.23. The status of amicus curiae given to complainants is nothing more than that available to "[a]ny interested person or organization [who] may file a petition to participate in a proceeding..." 45 C.F.R. §81.22(a). The presiding officer may grant the petition if the officer finds that the petitioner has a legitimate interest in the proceedings, that such participation will not unduly delay the outcome and may contribute materially to the proper disposition of the proceedings. As an amicus curiae, the complainant may not introduce evidence at the hearing. However, under the rules governing the administrative enforcement proceedings, an amicus curiae may request the presiding officer to propound specific questions to the witness. It is in the discretion of the presiding officer to grant any such request if the officer believes the proposed

additional testimony may assist materially in elucidating factual matters at issue between the parties and that the proposed questions will not expand the issues. 45 C.F.R. §81.22(c).

The complainants can very likely become the forgotten person in the enforcement process. The scheme of the regulations, and indeed of the legislation itself, is to use the complaint filed by an individual seeking redress against discrimination as a precipitating mechanism for the Department's monitoring enforcement process. The enforcement process is very much a matter between the Federal government and the recipients of Federal funds. The process is intended primarily to enable the government itself to make sure that recipients do not violate the underlying legislation. Resolution of a particular complaint is, in this process, only an incidental benefit to be granted to complaining parties.

The subsidiary role of the complainant in the enforcement process is further evident from the heavy emphasis in Title IX on the securement of voluntary compliance in enforcement of the Act. Title IX requires that no action to terminate or refuse funds shall be taken until it has been determined that compliance cannot be secured by voluntary means and, before termination, a report must be filed with the committees of the House and the Senate having legislative jurisdiction over the program or activity involved, setting forth the circumstances and grounds for termination. Termination may not become effective until thirty days have elapsed after filing of the report. 20 U.S.C. §1682. Likewise, when enforcement is by other means authorized by law, no action may be taken to effect compliance until the responsible Department official has determined that compliance cannot be secured by

voluntary means, the recipient has been notified of its failure to comply and of the action to be taken to effect compliance, and ten days have expired from the mialing of the notice to the recipient or any other person. During the ten day period, additional efforts must be made to persuade the recipient to comply with the regulations and to take such corrective action as may be appropriate. 45 C.F.R. §80.8(c), (d).

The overriding concern of this scheme of enforcement is not with the rights of individuals who suffer discrimination, but rather with harmony in a Federal system. The emphasis on voluntary compliance is intended to avoid conflicts within the Federal system between the National government and recipients of Federal financial assistance, particularly those recipients which are units of state or local government. In the compliance enforcement process, pursuant to the mandate to effect voluntary compliance, the concerns of individual complainants may be lost as enforcement officials attempt to secure broader policy goals. While such a compliance system may indeed well serve a purpose of Title IX in eliminating some kinds of discrimination, it does not adequately meet the requirement that recipients not discriminate on the basis of sex against persons. The administrative enforcement mechanism is inadequate for purposes of resolving individual complaints, and a private cause of action is necessary to enforce the rights of individuals.[2]

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[2] The problems outlined above have been explicitly acknowledged by the Government with respect to the enforcement of Section 504. In the *Memorandum of the United States as Amicus Curiae* in *Whitaker, supra*, the Government states:

> The administrative process established by Congress as part of Title VI centers entirely on the question of whether in light of

(footnote 2 cont'd)

> the policies and practices of a recipient of federal assistance, federal funds should continue to flow. It is predicated upon the need by the Secretary for a fund cut-off procedure which in turn permits the Secretary to carryout [sic] his or her responsibility under the statute. The Secretary's duty is to terminate federal funds if a recipient continues to discriminate or refuses to correct the effects of past discrimination. The purpose of an administrative hearing, thus, is to provide the Secretary with a forum in which to initiate termination proceedings. It is not intended to provide, nor has it operated as, a forum for program beneficiaries to litigate claims of discrimination against recipients. Unlike Title VII of the Civil Rights Act of 1964 [footnote omitted] which creates a primary mechanism for alleged victims of discrimination to utilize a federal agency to litigate on their behalf, the Title VI administrative process is for the use of the agency alone.... Additionally, the administrative remedy available under §504 is essentially prospective... Although future compliance may include rectifying the effects of past discrimination, as a practical matter this process may not afford effective or expeditious relief to individual victims of unlawful discrimination...
>
> [T]he filing of an individual complaint with the Secretary of the Department of Health, Education and Welfare does not result in any type of quasi-judicial process which will result in a determination of whether the individual's rights under the statute have been violated. Only an *investigation*, not a resolution, is provided for. In conducting an investigation of possible noncompliance, the Secretary acts on behalf of the United States and the grantor of Federal funds, and is not responsible for resolving the matter on behalf or in the interests of the complainant...
>
> [T]he hearings are designed to enforce the contract between the Secretary and the recipient. [Citation omitted]...
>
> Indeed, if HEW is unable to resolve a complaint which it believes to be justified, HEW's course of action would be to seek termination in an administrative enforcement proceeding. This sanction would close HEW's involvement in the case while according the aggrieved party no individual relief. Thus, the fund termination procedures would not regress an individual's grievance.

Ibid. at 11, 12, 13, 15, 16.

III. A PRIVATE RIGHT OF ACTION IS NECESSARY IN THIS CASE BECAUSE EXISTING ADMINISTRATIVE PROCEDURES ARE INADEQUATE TO ENFORCE THE LAW.

In the court below, the Department of Health, Education and Welfare, on rehearing, took the position that a private right of action lies under Title IX. 559 F. 2d at 1080. The Department recognized private suits as a useful means of enforcing the statutory policy of prohibiting discrimination on the basis of sex in Federally funded educational programs. 559 F. 2d at 1081. The United States has taken a similar position with respect to Section 504 in cases presently pending before Federal courts. *Memorandum of the United States as Amicus Curiae* in *Whitaker*, supra; *Brief for the United States as Amicus Curiae* in *Trageser v. Libbie Rehabilitation Center, Inc.*, No. 77-2224 (4th Cir.). The position taken by the United states should, in itself, be sufficient to demonstrate the need for private litigation in enforcement of Title IX because of the overburdened administrative process. But even without this admission by the United States, the public statements of the Department of Health, Education and Welfare are alone sufficient to demonstrate that the present scheme of administrative enforcement is not working.

With respect to Title IX, in 1975 H.E.W. issued proposed consolidated procedural rules to enforce certain civil rights provisions. 40 F.R. 24148 (June 4, 1975). The Department commented that the existing enforcement procedures had been developed primarily to implement Title VI of the Civil Rights Act of 1964 and were "expressly tailored to meet the Department's needs in a busy but relatively limited area." *Ibid.* At that time, the Department proposed shifting from a policy that was "reactive or complaint-oriented [and]

geared toward securing individual relief for persons claiming discrimination," to a policy of "a methodical approach geared toward identifying and eliminating systemic discrimination." *Ibid.* The Department expressed concern that a complaint-oriented enforcement system would not reveal all of the problems with sex discrimination which deserved Department attention, noting that more complaints involving sex discrimination in higher education academic employment had been received than on any other subject.

Nearly a year later, in connection with the Consolidated Procedural Rules, H.E.W. issued an "Intent to Issue Notice of Proposed Rulemaking." 41 F.R. 18394 (May 3, 1976). This document was concerned with "the difficult question of designing effective procedures for managing an increasing number of civil rights complaints." Noting the importance of the issue, the Department described the "astronomical growth in the number of cases which must be considered" and characterized its action as "an open advertisement for ideas...[to] shape a national response to these very difficult questions." *Ibid.*

Together, these statements by H.E.W. indicate difficulties the Department has encountered in enforcing Title IX. The experience under Section 504 has been somewhat similar.[3] Implementation of Section 504 was not

[3] H.E.W.'s reluctance to resolve individual complaints is also evident from its policy under Section 504. With respect to the proper classification and placement of handicapped children in preschool, elementary, and secondary education programs and the due process procedures established for resolving disputes over placement of those students, H.E.W. stated:

> While the Department does not intend to review individual placement decisions, it does intend to ensure that testing and evaluation procedures required by the regulation are carried out, and that school systems provide an adequate opportunity for parents to challenge and seek review of these critical decisions. And the Department will place a high priority on pursuing cases in which a pattern or practice of discriminatory placements may be involved. 42 F.R. 22677 (May 4, 1977).

be any means immediate. The delay of H.E.W. in issuing regulations provoked a lawsuit. In *Cherry v. Mathews*, 419 F. Supp. 922 (D.D.C. 1976), plaintiff sued the Secretary of H.E.W. to promulgate regulations. The response of the Department was that the statute imposed no explicit duty to issue regulations, in contrast to the direct conferral of rulemaking authority under Title VI. The Department's position contradicted clear legislative history. See 4 U.S. Code Cong. and Admin. News p. 6390 (1974). The court concluded that the Secretary was required to promulgate regulations effectuating Section 504; it took note of draft and proposed regulations already issued by the Secretary, 41 F.R. 20296 (May 17, 1976), 41 F.R. 29548 (July 16, 1976), but refused to establish a date by which final regulations must issue. The court did retain jurisdiction over the case to assure that "no further unreasonable delays affect the promulgation of regulations under §504." 419 F. Supp. at 924.

In its first published version of the proposed §504 regulations, H.E.W. took this position with respect to private judicial enforcement of the regulations:

> Section 84.6 [later consolidated with modified proposed Section 84.7 to form final regulation 45 C.F.R. §84.5] requires, as do both title VI and IX regulations, a recipient to submit to the Director an assurance that each of its programs and activities receiving or benefiting from Federal financial assistance from this Department will be conducted in compliance with this regulation. Because such an assurance is, in effect, a contract between the Department and the recipient, it has the effect of

> giving aggrieved persons who are beneficiaries of federally assisted programs or activities the right to seek judicial enforcement of the regulation, under the third party beneficiary principle of contract law. See *Lemon v. Bossier Parish*, 240 F. Supp. 709 (W.D. La. 1965), *aff'd* 370 F. 2d 847 (5th Cir. 1967), *cert. den.* 388 U.S. 911 (1967).
>
> 41 F.R. 20300 (May 17, 1976).

The second published version of the proposed H.E.W. Section 504 regulations carried this language *verbatim*. 41 F.R. 29552 (July 16, 1976).

In the final regulations, published May 4, 1977, the accompanying Analysis states:

> *Private rights of action.* Several commentators [to proposed versions of the regulations] urged that the regulation incorporate provision [sic] granting beneficiaries a private right of action against recipients under section 504. To confer such a right is beyond the authority of the executive branch of the Government. There is, however, case law holding that such a right exists. *Lloyd v. Regional Transportation Authority*, 548 F. 2d 1277 (7th Cir. 1977); see *Hairston v. Drosick* [423 F. Supp. 180 (S.D. W.Va. 1976)]; *Gurmankin v. Costanzo*, 411 F. Supp. 982 (E.D. Pa. 1976) [*aff'd on other grounds* 556 F. 2d 184 (3d Cir. 1977)] cf. *Lau v. Nichols, supra*.
>
> Analysis to 45 C.F.R. §84.5, 42 F.R. 22687 (May 4, 1977).

In guidelines established by H.E.W. pursuant to its authority under Executive Order 11914, 41 F.R. 17871 (April 29, 1976), to coordinate implementation of Section 504 for the Executive Branch, "Supplementary Information" published with the guidelines addressed the private right of action issue. These regulations are in addition to the H.E.W. Section 504 regulations, which apply to H.E.W.

programs. The Section 504 Executive Order guidelines are intended to guide other executive departments in their implementation of Section 504. Here H.E.W. states:

> One comment [to the proposed Executive Order Section 504 guidelines] requested a statement by the Department that this regulation creates no judicially enforceable rights. Such a statement, we believe, is inappropriate and unnecessary. Whether any legally enforceable rights are created by this regulation is a matter for courts to decide. We would only observe that the regulation applies to Federal agencies, not to recipients, and that it has no retroactive reach.
>
> 43 F.R. 2133 (Jan. 13, 1978). Analysis to regulations to be codified at 45. C.F.R. §85.4.

These statements by H.E.W. on the issue of a private right of action under Section 504 indicate at most a desire to see private litigation used to implement Section 504 and at least a deference to the courts in determining whether such litigation should be permitted. Certainly, H.E.W. has not expressed hostility in these statements to the concept of a private right of action. As the affidavit of Michael A. Middleton, appended to this brief, stated, "The Office for Civil Rights, as a matter of policy, believes that complainants should have a private right of action under Section 504 in federal courts, and that beneficiaries of H.E.W. programs should be allowed to file civil actions in federal courts without exhausting either the grievance procedures established by a recipient...or the Department's own complaint investigation procedure." Appendix at A2—A3.

Moreover, in an "Annual Operating Plan" for fiscal year 1978 for enforcement of nondiscrimination provisions in federally assisted programs, H.E.W. indicates that of 756 complaints expected to be filed in fiscal year 1978, which

H.E.W. estimates will be reduced to 664 by means of initial screening, only 26 will be investigated. Of 453 backlog complaints, only fourteen will be investigated. 43 F.R. 7054 (Feb. 17, 1978). See also the Middleton affidavit. Appendix at A3. It is therefore clear why one district court found that the H.E.W. administrative enforcement process provided "no effective relief whatsoever" for one plaintiff seeking relief under Section 504. *Camenisch v. University of Texas*, *supra* at 3.

In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), this Court allowed private citizens to bring a lawsuit to enforce the Voting Rights Act of 1965, 42 U.S.C. §1973 *et seq.* Noting that in the Act there was "certainly no specific exclusion of private actions," 393 U.S. at 555, n. 18, the Court commented on the importance of allowing a private right to sue:

> The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General. For example, the provisions of the Act extend to States and the *subdivisions thereof*. The Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government. It is consistent with the broad purpose of the Act to allow the individual citizen standing to insure that his city or county government complies with the §5 approval requirements.
>
> 393 U.S. 556-557 (footnotes omitted, emphasis in the original.)

It is clear that H.E.W. is unable to enforce the Title VI-Title IX-Section 504 scheme solely by means of administrative remedies. It is also clear that if individual complainants are required to depend solely on H.E.W., the

rights of those individuals as guaranteed by the legislation will not be adequately protected and the purposes of the legislation will be thwarted. For these reasons, a private cause of action must be allowed under Title IX.[4]

CONCLUSION

The private right of action under Title IX granted to individuals must be recognized as consistent with the legislative history, as necessitated by the structure and inadequacy of the administrative enforcement process, and as required to implement the statute. *Amici Curiae* urge that the judgment of the Court of Appeals be reversed and the case remanded.

Respectfully submitted,

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Attorney for *Amici Curiae*

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[4] On rehearing, the Court below rejected the argument that the inclusion of Title IX within the provisions of the Attorney's Fees Award Act, 42 U.S.C. §1988, implied that Congress intended to create a private right of action under Title IX. 559 F. 2d at 1080. While *amici* herein have not addressed this issue in the belief that it will be fully addressed by the parties and other *amici*, we believe it worth noting that in legislation to amend the Rehabilitation Act, a provision has been included to allow courts to award any prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs in any action or proceeding to enforce Section 504, as well as other civil rights provisions of the Rehabilitation Act. H.R. 12467, 95th Cong., 2nd Sess. §119.

APPENDIX

AFFIDAVIT OF MICHAEL A. MIDDLETON
FILED WITH *MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS SECTION 504 REHABILITATION ACT CLAIMS*

IN

WHITAKER v. CITY UNIVERSITY OF NEW YORK, Docket No. 75 Civ. 2258 (JM)

CITY OF WASHINGTON)
) SS
DISTRICT OF COLUMBIA)

AFFIDAVIT OF MICHAEL A. MIDDLETON

Michael A. Middleton, Director, Division of Policy and Procedures, Office of Policy, Planning and Research, Office for Civil Rights, Department of Health, Education, and Welfare, being duly sworn, deposes and says:

1. The Office for Civil Rights in the Department of Health, Education, and Welfare has enforcement responsibilities for Section 504 of the Rehabilitation Act of 1973 and the Department's implementing regulations, 45 C.F.R. Part 84. My division, in the Office of Policy, Planning and Research, is responsible for the development of policy under Section 504.

2. The Office for Civil Rights, as a matter of policy, believes that complainants should have a private right of action under Section 504 in federal courts, and that beneficiaries of HEW assisted programs should be allowed to file civil actions in federal courts without exhausting either the grievance procedures established by a recipient pursuant to 45 C.F.R. 84.7 or the Department's own complaint investigation procedures established pursuant to 45 C.F.R. 80.7. Such a standard for Section 504 is consistent with Departmental policy followed under Title VI of the Civil Rights Act of 1964, the statute prohibiting discrimination on the basis of race, color or national origin in federally assisted programs. The legislative history of the Rehabilitation Act Amendments of 1974 states that Section 504 should be enforced in the same manner that the Department enforces Title VI.

3. It is important that beneficiaries of HEW funded programs have a choice of forum for complaints of alleged discrimination. The Office for Civil Rights has a large backlog of complaints and there is presently no guarantee that any newly filed complaint can be investigated and resolved in an expeditious manner. It would be inconsistent with the Department's desire and the public's need for the speedy resolution of complaints to prohibit aggrieved parties who wish to file suit from doing so and then subject them to a lengthy period of time before acting upon their claim.

It would therefore work a hardship on complainants if they were only allowed access to the courts after they had exhausted their administrative procedures.

/s/ Michael A. Middleton
Michael A. Middleton, Affiant

Subscribed and sworn to before me, this 26th day of June, 1978.

/s/ Loraine Halloway
Notary Public

My Commission Expires:
January 1, 1979. (LH)